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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 In Re: METHYL TERTIARY BUTYL
ETHER ("MTBE") PRODUCTS 00 CV 1898 (SAS)
4 LIABILITY LITIGATION

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5 New York, N.Y.
6 January 15, 2015
2:30 p.m.

7 Before:

8 HON. SHIRA A. SCHEINDLIN

9 District Judge

10
11 APPEARANCES

12 LIAISON COUNSEL FOR PLAINTIFFS:

13 ROBIN GREENWALD, ESQ.
14 LEONARD KAUFMAN, ESQ.
MICHAEL AXLINE, ESQ.
15 DUANE MILLER, ESQ.
JOHN GILMOUR, ESQ.
16 WILL PETIT, ESQ.
WILLIAM JACKSON, ESQ.
17 NATHAN SHORT, ESQ.
STEPHEN CORR, ESQ.

18 LIAISON COUNSEL FOR DEFENDANTS:

19 JAMES PARDO, ESQ.
STEPHEN RICCARDULLI, ESQ.
20 MICHAEL DILLON, ESQ.
LISA GERSON, ESQ.
21 PAMELA HANE BUTT, ESQ.
WILLIAM STACK, ESQ.
22 MARK LILLIE, ESQ.
STEVE LEIFER, ESQ.
23 CARLOS BOLLAR, ESQ.
JAMES TUI TE, ESQ.
24
25

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(Case called)

(In open court)

THE COURT: I understand there's a couple of people on the phone. I may want to say hello to them first and then they can stay quiet. This is Judge Scheindlin. Can you hear me on the phone?

MR. CEPEDA: Yes, your Honor I can hear.

THE COURT: All right, can you just identify yourself, just the two folks on the phone.

MR. CEPEDA: This is Alejandro Cepeda on behalf of Sol Puerto Rico, Limited.

MR. CARTER: Clem Carter, McGuire Woods, on behalf of Western Refining Yorktown, Inc.

THE COURT: Because I have a lot of folks in the courtroom and it's difficult to participate by phone as I understand it you folks will just be listening but will not be speaking today. So I'm now going to greet the folks who are here. Ms. Greenwald, good afternoon. Mr. Axline, good afternoon. Mr. Miller, good afternoon Mr. Petit, good afternoon. Mr. Gilmour, good afternoon. Mr. Kaufman, good afternoon. Mr. Corr, good afternoon.

COUNSEL: Good afternoon, your Honor.

THE COURT: That's for the plaintiff's group.

You know what, I'll say good afternoon to you at the end, all of you at once. Mr. Pardo, Mr. Riccardulli,

F1FFMTBC

1 Mr. Lillie, Ms. Hanebutt, Mr. Tuite, Mr. Leifer, Mr. Dillon,
2 Mr. Bollar, Mr. Stack, Mr. Bongiorno, Ms. Gerson, Mr. Correll.

3 COUNSEL: Good afternoon, your Honor.

4 THE COURT: And to everybody else whose names I
5 haven't read off but I obviously see you, I know you're
6 present. We do have a court reporter obviously. When somebody
7 speaks please say your name for the record. I may know all of
8 your names or at least most of you who are seated at the table,
9 but the court reporter does not see you as often as I do and so
10 it would be best if you would identify yourself each time.

11 So in terms of the agenda that I thought we were going
12 to have today, it begins with the New Jersey matter and the
13 question of what is to be remanded and then we go on to the
14 Pennsylvania case and there's some issues there as to whether
15 the so-called insurance case should stay in the MDL or go back
16 to the District of Pennsylvania and what to do about the
17 pending motions. And then maybe there's a need for an update
18 in the Puerto Rico case. I think I missed one item that we've
19 been discussing in the Pennsylvania matter that's the issue of
20 the personal jurisdiction motion with respect to the company
21 known as Lukoil Americas Corporation and we'll discuss that
22 too. That was all that I had on the agenda.

23 Did anybody think there was any other item that you
24 had planned to discuss today or would like to discuss today?

25 MR. PARDO: Not for us, your Honor. Jim Pardo,

F1FFMTBC

liaison counsel for defense. No, your Honor.

THE COURT: That's for you. Anybody else have any other items they wanted to bring up? No. Then we will start with the New Jersey matter. The plaintiffs say the full case is ready to return to New Jersey and the defendants say not so fast you should do it in part and there's precedent for doing it in part, you should only send back that which is ready to be tried and you should leave the remainder here as part of the MDL for continued discovery and/or resolution which may well be affected by the trial of the bellwether sites.

So who wishes to be heard first? All right, Mr. Pardo, that's fine.

MR. PARDO: First on my feet. Well, good afternoon, your Honor. It actually feels like some time in which we've been here. I think it was October, is that right?

THE COURT: That's unusually long for us but that's right.

MR. PARDO: Well, happy new year. Yes, we agree with the defendants in this respect the 19 or 20 focus sites which we picked back in 2010 -- I know, right? -- are ready to go back and should go back. And the purpose of selecting those focus sites is that so they would go back. We would try those to a verdict or come to some other resolution I suppose back there, and that would be guidance for us and for the plaintiffs back in this courtroom. And that's the key point, your Honor.

F1FFMTBC

1 Because at the time that we set this up, and you can go back
2 and look at the transcripts just as we can, we had a discussion
3 about this, about what should go back, how many, and we, the
4 defendants, actually suggested to you at that time that maybe
5 we want to send some more back when we do this, okay? Maybe it
6 should be these 20 and some others so that the trial judge can
7 pick from others and try a few more and you said in no
8 uncertain terms, no way no how. The trial judge will be
9 permitted to try 20 or fewer but she will not be permitted to
10 try more. Not as part of that first tranche that I'm going to
11 send back. And the only way that that can be assured is if
12 only the 20 in fact go back, which is what you and I believe
13 the parties contemplated all along.

14 That is the most efficient approach. You can see the
15 case law as well as we can. It is replete with examples of
16 Courts in cases like this, sometimes multiple cases but also
17 large cases, large MDLs and this case is larger than most MDLs
18 are. These sites are in many ways like their own cases, okay?
19 Different defendants, different causes of action, somewhat
20 unique facts but common facts as well.

21 THE COURT: I guess my question is what would you
22 think we would do here in the MDL court if and when the 20 are
23 resolved but it doesn't lead to a global settlement? What
24 would be the next step here? Would we just begin discovery on
25 a second tranche of 20 or what? What would you envision?

F1FFMTBC

1 Would there be more new motion practice? I realize it might
2 depend on what that verdict is, but nonetheless, what do you
3 envision if trying the 20 doesn't end the entire New Jersey
4 case, then what would you envision?

5 MR. PARDO: Well, it's a discussion we've started to
6 have, okay? Obviously, your point is the one we've dwelled on
7 as well. That is the answer to that depends in large part on
8 what we get out of that first trial. We may come away with
9 guidance, verdicts, whatever, that make this a much, much
10 smaller case, we think, and that may guide us in how we
11 structure the rest of those cases here. Maybe we do a larger
12 tranche, maybe we do something else. But I think I can say
13 with some confidence that we are looking for other ways, we are
14 contemplating other ways of working up those cases besides just
15 picking another 20 focus sites. I think that that is, that is
16 and was the right way, the best way, the most efficient way to
17 start this but it's not necessarily the right, best or
18 efficient way to continue it if in fact we have to. I think
19 the next step may be to try to come up with some maybe broader
20 categories of cases from which we can then make some selections
21 for either discovery or remand for trial that would provide
22 more focused guidance for purposes of those categories. I
23 don't believe now that we, at least defendants would come back
24 to you and suggest that the next step is another 20 sites.
25 Because to do that, you'll be 160 years old when we finish this

F1FFMTBC

1 case. Obviously, that won't happen. We can't do it that way
2 and we don't need to do it that way. There will be a better
3 way to do it.

4 But until we get that verdict or verdicts in that
5 initial trial I don't know that we can predict or say right now
6 with certainty what those charges are.

7 THE COURT: Let me say it this way. If it takes a
8 year, for example, to get that verdict would we be doing
9 nothing here in the MDL court with respect to the New Jersey
10 case? It would just be sitting here sort of resting so it
11 doesn't matter which court it's resting in or would we be
12 moving it forward in some way or other?

13 MR. PARDO: Well, that's a great question.

14 THE COURT: I know.

15 MR. PARDO: We could stay them, but I don't know if
16 that makes -- again, this is a discussion that we as the
17 defendants have started to have. We still need to speak with
18 plaintiffs about what their ideas and preferences are as well.
19 But not necessarily would we have to, they don't necessarily
20 have to be stayed, your Honor. There may be some preliminary
21 type, broader discovery that we could use akin to almost like a
22 Lone Pine approach --

23 THE COURT: A what?

24 MR. PARDO: A Lone Pine, preliminary discovery that we
25 could use to take those other 5,245 cases whatever it is and

F1FFMTBC

1 start putting them into buckets. I don't know how long that
2 would take. I don't know that it would take --

3 THE COURT: I don't mind that. But if there's no
4 activity at all versus some activity it might affect my view on
5 whether it's appropriate to sever it, to sever the trial ready
6 bellwether cases and keep the remainder here with some
7 activity, but if it simply languishes as a statistic while
8 you're waiting for this trial to be resolved that may be a
9 little more difficult. You used the word "she." Do you
10 actually know whose case this is?

11 MR. PARDO: Judge Wolfson, your Honor. Frieda
12 Wolfson, your Honor.

13 MR. KAUFMAN: It was assigned to her. It was assigned
14 the MDL.

15 THE COURT: Years ago?

16 MR. KAUFMAN: We don't know if it will go back to her
17 but she was the last one to have it.

18 MR. PARDO: I don't think this would languish, your
19 Honor. I think there are ways which we could do it very
20 efficiently, some sort of higher level discovery, maybe even in
21 an informal type setting because I know both sides are going to
22 be busy, many of us back in front of Judge Wolfson aimed at at
23 least starting to take that mass of cases, over 99 percent of
24 the cases let's start getting them into some buckets that we
25 can then begin to focus on.

F1FFMTBC

1 THE COURT: Who wants to be heard for the plaintiffs?

2 MR. AXLINE: Mike Axline, your Honor. I want to start
3 by saying I want to say we had a different understanding of why
4 we identified the bellwether sites than Mr. Pardo represents.
5 The idea was to conduct complete discovery for those sites and
6 then send those sites back for trial but it wasn't like you
7 said we're only going to permit 20 sites to go back for trial,
8 you said I'm not going to impose more than 20 sites on the
9 trial judge so there was no discussion of what we were going to
10 do when we arrived at the point where we are now. So we were
11 quite sincerely surprised when the defendants after having said
12 six months ago that the case was ready for remand said well,
13 only part of the case is ready for remand. So I'll just put
14 that on the record.

15 In terms of the practical management of the case going
16 forward, your Honor, in thinking about the consequences of
17 going each route, it does seem to me like a couple of things
18 are virtual certainties. One, the case is likely to be
19 somewhat smaller by the time it gets to Judge Wolfson. There
20 are likely to be some additional settlements.

21 THE COURT: Sure.

22 MR. AXLINE: We don't know how many sites are going to
23 be involved even before trial much less after trial now.
24 Second, Judge Wolfson is going to get a view of the New Jersey
25 claims that this Court has not yet had because she's going to

F1FFMTBC

1 do the trial. She's also going to I think understand because
2 of that what the possibilities are going forward in a way that
3 this Court cannot, so in terms of managing the case post trial
4 Judge Wolfson is going to have not only the benefit of your
5 rulings in this case because you've got all that but she is
6 going to have something you will not have and that is having
7 gone through a trial with the cases.

8 THE COURT: Well, maybe yes, maybe no. My experience
9 is that sometimes while everybody expects a trial no trial will
10 occur. These 20 sites will somehow miraculously settle on the
11 eve of trial or slightly before the eve and in fact she will
12 not have any exposure to the case and there will still be 5,000
13 sites that will need to be looked up. She will have done
14 nothing in the MTBE case. This is a possibility. You know
15 yourself trials are rare and things happen. So I can't predict
16 which it will be. I know on my docket it looks like trial,
17 trial, then miraculously no trial. I don't know what
18 experience you will have at the end of the day or won't have.

19 MR. AXLINE: I understand that possibility, your
20 Honor, but I think the probability is unless the case is
21 settled as a whole she's going to try these sites. Every
22 settlement that has come down the pike so far has been a global
23 settlement. Nobody to date has settled just one site. So
24 while it's a possibility I think it unlikely. So in any event
25 if we're trying to make judgments about how to manage the case

F1FFMTBC

1 going forward in the face of uncertainty, I do think that the
2 way this case is structured now she's going to try these sites
3 and she's going to get a very closeup view --

4 THE COURT: You keep saying that. I say only with a
5 trial in her courtroom.

6 MR. AXLINE: With that caveat.

7 THE COURT: Yes and if there isn't a trial in her
8 courtroom for some reason then she's really not in a position
9 to go forward and if it takes a long time for that trial to get
10 scheduled and tried and there's dead time in between, I don't
11 know her, I don't know her docket and I don't know her court,
12 but what if you all go back and she says oh, looking at my
13 trial calendar this is a long one this is going to take three
14 or four months, I can't try this until March of 2016. I'm just
15 making that up. If she says that then the whole case is dead
16 and really is for 16 months because she can't do any of it.
17 This as you know is long, long running, all of us have much
18 experience to have it move forward, there's no reason to have
19 any dead time here which is why I questioned Mr. Pardo. If I
20 followed his idea would I just be a babysitter for a stay
21 period of however long it takes to get to it, try it, get a
22 verdict not to mention post trial issues? Or can we accomplish
23 something pretrial which is what the MDL is designed for.
24 Those are some of the considerations I have. Right now this
25 judge is not working with this and I don't know how fast she

F1FFMTBC

1 can reach it. You haven't yet been before her yet for a
2 conference to find that out. Not yet, right?

3 MR. AXLINE: No.

4 THE COURT: Of course not yet. One thing an MDL judge
5 can always do is reach out to her. I can judge to judge and
6 just find out what things look like. How long do you think
7 this case would take to try in its current posture? I would
8 think several months. What do you think?

9 MR. AXLINE: I think several months is a good
10 estimate. We have some track record now to look to, that's
11 what it often takes.

12 THE COURT: That's what it often takes.

13 MR. AXLINE: I'll make one other point unless your
14 Honor has any other questions and that is that the purpose of
15 the bellwether obviously goes without saying is so that you can
16 get to that stage in the whole process and then stop and
17 evaluate based on that experience. So we have set this up that
18 way up until now.

19 THE COURT: Absolutely.

20 MR. AXLINE: It does seem to me going back to the
21 beginning because what the defendants were pushing for at the
22 beginning was to do the case as a whole and that's where you
23 said no, we're not doing that, that's unmanageable, but now
24 they're kind of pushing that way again.

25 THE COURT: Not exactly. Now they're thinking along

F1FFMTBC

1 the lines of categories I think the word used was buckets,
2 where it takes some meeting and some thinking maybe there would
3 end up being ten buckets which would have representative types
4 of sites and within those ten buckets it may be that one site
5 per bucket would have an approach long ago, a good approach now
6 and maybe those ten cases would have to begin in some way to
7 move forward both general and specific in terms of discovery.
8 So those are some thoughts I have.

9 Let me ask you this: If you wanted me -- you might
10 just be seated for a minute. If you wanted me to tell you my
11 impressions based on the letters and this brief argument I will
12 do that. If you think this requires and is worth the time for
13 a briefing schedule I will do that, but I suspect that a
14 briefing schedule will probably lead to the same result that I
15 think is appropriate today, so since you're anxious to get to
16 the nearby bordering state of New Jersey, you probably want me
17 to tell you what I think now.

18 MR. AXLINE: We would welcome your thoughts, your
19 Honor. I don't know about the defendants but --

20 THE COURT: Well, as opposed to full briefing.

21 MR. PARDO: We'd welcome your thoughts now as well
22 too.

23 THE COURT: My thought was to get the case that is
24 going to be tried to New Jersey as promptly as possible and the
25 best way to do that is to sever it and I would send back the

F1FFMTBC

1 case in part, the bellwether trial case so that she can have a
2 conference with you, she can schedule a trial with you, you can
3 see what the schedule really looks like in reality. When you
4 tell a judge you're going to be on trial three to four months
5 it's not as easy for them to calendar it compared to one week.
6 Tell a judge you have a one-week trial, they'll find you a
7 week, but three or four months is harder to find. The sooner
8 you get there and talk about trial dates whether or not there's
9 any last minute trial work to do that's fine. It also focuses
10 the mind on settlement. Once you're back in New Jersey facing
11 the judge and you have a trial date that as you already
12 suggested will probably lead to more settlements. In the
13 meantime, given all the experience in the MDL with all the
14 other cases and all the parties on a second track we should be
15 following up with the suggestion of how to move the remainder
16 forward even while the bellwether trial is being scheduled and
17 maybe held one of these months. But this idea of categories
18 and buckets and how to work with that, prioritizing maybe, at
19 least those ideas could be generated and followed through here.
20 So my thought would be to sever it and get it back there fast.
21 If you're going to fight for the whole then I think there's
22 going to have to be full briefing because the defendants oppose
23 it. I always said briefing takes between six and ten weeks for
24 any motion and another eight weeks to decide so you're losing
25 five more months just waiting around to get sent back where you

F1FFMTBC

1 could be sent back tomorrow and be in New Jersey. That's where
2 I would come out on this one. Anybody want to be heard
3 further. Mr. Axline?

4 MR. AXLINE: I appreciate you sharing your thoughts,
5 your Honor. I do have one reaction and that is that in terms
6 of case management I do think it would be useful before making
7 a final decision about this to have a conversation with Judge
8 Wolfson. Obviously the plaintiffs would not have any problem
9 with that, I doubt the defendants would. If the case is going
10 to be in two jurisdictions at the same time that sort of
11 communication is probably a good idea anyway.

12 THE COURT: Well, sure, no question about it. I would
13 reach out to her immediately today or tomorrow.

14 MR. PARDO: We would have no objection to that, your
15 Honor. The approach that you've laid out, I know it's not a
16 ruling, is of course consistent with I think where the
17 defendants want to go. So we see no need at this point for
18 briefing.

19 MR. AXLINE: Could I have a moment to consult with my
20 colleagues?

21 THE COURT: Sure.

22 MR. AXLINE: Your Honor, Mr. Kaufman made an excellent
23 point which is before we commit to something like that we
24 probably should check with the client. They're very interested
25 in every aspect of the case, so if we could have a couple of

F1FFMTBC

1 days to discuss with them whether they think briefing would be
2 desirable or not, we'd appreciate that.

3 THE COURT: Sure. There's no reason to delay, though,
4 in my contacting Judge Wolfson, right?

5 MR. AXLINE: I see no reason.

6 THE COURT: Okay. So I'll do that.

7 MR. AXLINE: And frankly, your Honor, if there's
8 anything that you think would be useful to share with the
9 parties after that conversation, we'd welcome it.

10 THE COURT: I know who the counsel are.

11 That takes us to the Pennsylvania case. I think we
12 begin with that motion to sever the so-called insurance case.
13 Somebody, yes, sorry your name is?

14 MR. LILLIE: Good afternoon, your Honor. Mark Lillie
15 on behalf of BP. The Court's agenda asked for an update on the
16 procedural posture. Let me give you a quick snapshot of where
17 that is. It actually goes back to the summertime but a more
18 recent snapshot shows that in the MTBE case the state of
19 Pennsylvania tacked on three new claims at the end of October
20 and so while you've got the traditional MTBE claims in the
21 original complaint you now have this entirely different set of
22 claims here. Those claims are three. They are subrogation
23 under Pennsylvania law, unjust enrichment under Pennsylvania
24 law and a claim under the State Tank Fund statute, if you will.
25 And this all has to do with basically commercial insurance

F1FFMTBC

1 issues and I'm not sure if the Court has familiarity with one
2 of these state tank funds but typically how they work as it
3 does in Pennsylvania is that the marketer of gasoline pays a
4 fee for every gallon of gasoline that goes into a tank it's
5 held in trust by the State Tank Fund to help facilitate
6 cleanups when they're needed and under a very strict regimen
7 that is in the tank fund statute people who have spills from
8 their tanks are able to petition for, if they're eligible, for
9 reimbursement. It doesn't necessarily cover all the costs, it
10 may cover some of them and there is a cap above which in any
11 event the state will not reimburse.

12 So that's the fundamental statutory framework that
13 brings us here. These claims that are now the three additional
14 claims brought against certain of these defendants were
15 originally in a separate lawsuit filed in state court in
16 Pennsylvania.

17 THE COURT: But removed by the defendants under the
18 Energy Policy Act?

19 MR. LILLIE: That's correct, Judge and there are
20 different sets of lawyers involved for the different sides.
21 Our fundamental premise is that the starting point as to
22 whether these claims should be in MDL 1358 is to go to the
23 transfer order that was issued by the JPML in 2000 and that
24 order establishing a products liability MDL here speaks to two
25 very different issues from the ones that are pled in this

F1FFMTBC

1 complaint. That order says that this MDL is established for
2 common questions of fact concerning, one, whether defendants
3 knew about and misrepresented the nature of MTBE and conspired
4 to market MTBE without disclosing its risks to downstream
5 users, the federal government or the public and, secondly,
6 whether plaintiffs sustained drinking water contamination as a
7 result of MTBE contamination. Neither of those mandates from
8 the JPML fit the claims that are on these added on claims
9 counts seven, eight and nine in the new complaint.

10 THE COURT: How much of the discovery would be in
11 common? In other words, if you pursue this tank fund claim or
12 the unjust enrichment or I forget the third one you mentioned,
13 how much would you have to learn that is going to be learned in
14 the main so-called MTBE case. Remember as we just discussed in
15 the New Jersey matter the MDL is a pretrial situation, it tries
16 to coordinate pretrial discovery across the board. If the
17 discovery is going to be repetitive to some extent, not in
18 full, but were there spills, were there cleanups, who is at
19 fault, who has to pay, if some of those are in common what's
20 the problem of keeping the case as a whole for the pretrial
21 purposes but then it may well be that those claims shouldn't go
22 to trial, the product liability claims when the time comes but
23 you don't depose the people twice, you don't have duplicative
24 experts, etc. I'm not arguing with you, I'm merely asking you
25 that.

F1FFMTBC

1 MR. LILLIE: Yes, your Honor. I think there's no
2 question but is there some sliver of evidence that could be
3 common.

4 THE COURT: Sliver? Or is there significant overlap?

5 MR. LILLIE: No, I don't think it's a significant
6 overlap. What would be most relevant in the MTBE case are the
7 documents relevant to the decision to use MTBE, the marketing
8 strategy, the way in which product gets into the particular
9 state, the risks of using MTBE and so on and so forth. In our
10 insurance docket what's relevant is what were the commercial
11 insurance policies that these companies had, the people who
12 managed those risk management policies, if you will, are
13 different from --

14 THE COURT: Let me interrupt you. You seem to be
15 highlighting the differences. I'm looking for the overlaps.
16 Do you remember seeing those graphs, where there's circles and
17 the middle circle has the gray where they overlap? I'm looking
18 for the overlap. You don't have to insure anything if there
19 isn't a spill, there's been no harm. If there's been harm
20 there's a damage, somebody has to pay for it. You have to
21 apportion who is going to pay what, the overlap is in the
22 middle. I appreciate the difference but I haven't heard you
23 address the overlap, whether it's a sliver or a mountain I
24 don't know but could you address the overlap?

25 MR. LILLIE: I can address it to some extent. We're

F1FFMTBC

1 at a very early stage, no discovery has happened.

2 THE COURT: I know.

3 MR. LILLIE: Yes for the tank fund issues it would be
4 relevant to know when did the spill take place, what was the
5 corner at which it took place and how much was paid by the
6 party cleaning up the site and how much was paid by the state.

7 THE COURT: And who might be the responsible party for
8 the spill? Can the responsible party be identified? Right?
9 Who it might be, whether it really caused any harm. These
10 might be issues also in the insurance.

11 MR. LILLIE: I think that the environmental harm is
12 already assumed with respect to these tank fund claims because
13 it's already been demonstrated that there's been a leak. That
14 leak took place at a particular point in time which the statute
15 covers and the administrator at the State Tank Fund made a
16 determination that these kind of claims were eligible.

17 THE COURT: That may be for the tank fund claim. You
18 mentioned two other claims. One you said was unjust enrichment
19 I forget what you said the third one.

20 MR. LILLIE: The third one is the subrogation claim.
21 They all revolve around the basic set the facts and the basic
22 claim is that these companies that had spills filed coverage
23 litigation in varying places and monetized those policies and
24 in essence the allegation is that they double dipped. They got
25 paid there for certain environmental claims and now they're

F1FFMTBC

1 also getting paid by the State Tank Fund. That's the essence
2 of the claim. So with those basic statements the State claims
3 a subrogation point in count seven claiming that they as the
4 subrogee have a claim against us as the subrogor, we're now
5 getting into the Rule 12 motion which I guess we'll address a
6 little bit later, but there's a problem with that. The unjust
7 enrichment claim is the same basic set of facts giving rise to
8 their claim of a double dip and the statutory claim falls
9 within the specific provisions of the statute.

10 THE COURT: Let me hear from somebody on the
11 plaintiff's side about whether the insurance claims so to speak
12 should remain as part of the main case.

13 MR. CORR: Good afternoon, your Honor. Steven Corr on
14 behalf of the Commonwealth of Pennsylvania.

15 THE COURT: Are you with a law firm?

16 MR. CORR: With Stark & Stark. I guess my view of
17 slivers is a little bigger than Mr. Lillie's, unfortunately I
18 probably eat that way too. The motion -- Mr. Lillie started on
19 the procedural process here and where we filed originally was
20 in the state court in Pennsylvania. The removal was based
21 solely on a relation to MTBE.

22 THE COURT: It was under the Energy Policy Act.

23 MR. CORR: And specifically that section that dealt
24 with MTBE.

25 THE COURT: I understand but that just gives the Court

F1FFMTBC

1 federal jurisdiction. They have their reason for preferring to
2 be in a federal court. That's okay as long as the Court has
3 jurisdiction, but that doesn't necessarily mean that it should
4 be part of the MDL as opposed to a federal court in
5 Pennsylvania. But go ahead.

6 MR. CORR: I appreciate that difference too. What the
7 Commonwealth felt was that when both cases were removed to
8 federal court that it was efficient not just for the court
9 system but also the state to have them consolidated. That's
10 why the ultimate decision was made when the MTBE claims were
11 sent to the MDL. The state then decided to dismiss their case
12 without prejudice in the Eastern District of Pennsylvania,
13 consolidate here for the very fact that the USTIF, the
14 Underground Storage Tank Indemnification Fund, the USTIF, all
15 of those claims will have to be looked at, all of those claim
16 files will be the same claim files for the insurance claims as
17 they will for the MTBE. The overlap among the insurance claims
18 of MTBE will be significantly different. Many of the insurance
19 claims will involve MTBE. They will have MTBE pollution. So
20 any file that's going to be pulled out they'll be looking at
21 those documents because it is exactly what the claim was for,
22 why they filed a claim with USTIF was pollution that included
23 MTBE. It was then cleaned up.

24 THE COURT: Yes, but what's the issue left to
25 litigate? In other words your adversary says the spill is

F1FFMTBC

1 acknowledged, it's been cleaned up, so it's not about whether
2 there was a spill or who caused it. He's saying that's a given
3 now. Now you're talking about covering issues.

4 MR. CORR: And your Honor made a great point with
5 Mr. Lillie because the fact is we're looking at pretrial and
6 discovery standpoint. What is more efficient for the Courts?

7 THE COURT: I'm asking you where the overlap of
8 discovery is.

9 MR. CORR: I'm saying these files, the people that are
10 in the USTIF, the people in the Commonwealth that are going to
11 be deposed, they're all going to be the same, they'll all come
12 from the same departments, the same people that deal with it.
13 The actual number of people at USTIF who are involved with
14 these claims whether they're MTBE or not MTBE is very few.
15 They will be the same people who are going to be deposed. The
16 same record keepers, custodians who are going to have to come
17 testify this is what these records are this is what it means.
18 Certainly those records may separate out at some point where
19 the insurance claims go in a different direction but for
20 pretrial purposes and convenience purposes to have one federal
21 judge overseeing that discovery is the better route to go. And
22 ultimately if the decision is made to sever we also then, the
23 Commonwealth feels that there would not be federal jurisdiction
24 because the jurisdiction is based solely on the MTBE claim.

25 THE COURT: You keep calling it the MTBE claim but it

F1FFMTBC

1 is the Energy Policy Act. They understand, the defense
2 understands that some of these are MTBE, no fighting about
3 that.

4 MR. CORR: That's true. We agree with that there is
5 some overlap.

6 THE COURT: So there will be jurisdiction if it goes
7 back because it is under the Energy Policy Act. All right,
8 again as I did in the first case I think it's probably wise to
9 tell you my view on this and again if it's worth the time for
10 full briefing I can't say you shouldn't do it, but my view is
11 always one of efficiency both for the case, the litigants and
12 the court system. And it does seem to me that the pretrial
13 discovery purposes it is best to keep the case as a single case
14 and to coordinate the discovery in one, before one judge and in
15 one courtroom and not have it in two different places. That
16 may sound to you inconsistent with the prior ruling but I don't
17 think it is. This is the place where we've been handling
18 pretrial proceedings for a long time. And while I do think
19 there are many differences, Mr. Lillie, I agree, there are some
20 issues that have never been here before and will never be here
21 again, I understand that, but because there's a fair amount of
22 overlap I just don't think two different federal judges should
23 be doing the same thing at the same time, possibly having
24 conflicting schedules of discovery with many of the same
25 witnesses and many of the same documents. So my inclination is

F1FFMTBC

1 to keep it together for pretrial purposes and then to sever it
2 out as need be down the road potentially in motions if they
3 don't relate to the issues that are generally here. That's
4 where I would come out short of full briefing. I'd be happy to
5 hear your views, Mr. Lillie, now that I told you what I think I
6 would do at this point.

7 MR. LILLIE: I appreciate the insight, Judge. I think
8 what probably makes the most sense from my perspective is to go
9 back to my group which is a different group from the MTBE
10 group.

11 THE COURT: I realize that.

12 MR. LILLIE: And advise them where the Court is and to
13 make a determination whether we should move in a different
14 direction. If that's acceptable to the Court?

15 THE COURT: It is. I think what I would suggest you
16 realize you're going to have to go through pretrial discovery
17 one place or another doesn't really matter very much. It's
18 just an effort to coordinate those witnesses that do overlap,
19 those issues that do overlap to the extent there are separate
20 issues sobeit down the road will have to be handled separate.
21 But those are my thoughts on that issue.

22 MR. LILLIE: Thank you.

23 THE COURT: Okay. And now the Lukoil personal
24 jurisdiction issue. Who wants to speak about that?

25 MR. TUIITE: Your Honor, James Tuite representing

F1FFMTBC

1 Lukoil Americas Corporation. We filed a motion to dismiss for
2 lack of personal jurisdiction because Lukoil Americas
3 Corporation is a holding company that has no contacts with the
4 state of Pennsylvania. Now, the recent letters --

5 THE COURT: Yes, the real issue is whether to allow
6 jurisdictional discovery.

7 MR. TUIITE: Without jurisdiction. It's a 12(b)(2)
8 motion saying the because state courts would lack jurisdiction
9 over Lukoil Americas Corporation that this Court lacks
10 jurisdiction over Lukoil Americas Corporation.

11 THE COURT: Right. But the question on this case
12 always becomes should jurisdictional discovery be allowed. Is
13 there enough in the pleadings to warrant that. It doesn't have
14 to rise to the level of a prima facie case yet. I took a few
15 moments to check the law at least in this circuit which may be
16 different than the Third, but it doesn't have to make the
17 showing yet. But it has to be more than conclusory non-fact
18 specific allegations and there has to be some showing and the
19 question is is there enough of a showing here to at least get
20 the ball rolling, have this jurisdictional discovery and it may
21 be, I don't know whether -- your name again?

22 MR. CORR: Steven Corr.

23 THE COURT: I don't know if whether Mr. Corr after
24 seeing some of that discovery will say I've got the wrong
25 Lukoil entities, it's not the holding company I should have,

F1FFMTBC

1 it's the such and such company, it may be that it will quickly
2 bring the matter to a head. Sometimes parties name the wrong
3 company when there's a lot of companies with the same name and
4 then they correct it and get it right. Again, this is again my
5 inclination here is to allow some jurisdictional discovery to
6 clean up the issue. If you're right you win quickly and you're
7 gone.

8 MR. TUIITE: That's correct, your Honor. I sort of
9 anticipated that's where you would head on this issue. What I
10 would like to address, though, is to make that discovery
11 productive and meaningful and not have it be excessive and
12 burdensome.

13 THE COURT: I agree with that.

14 MR. TUIITE: I'd like to address the time period
15 discovery should cover. Lukoil provided documents to plaintiff
16 to support this, didn't come into existence until the end of
17 2000. It acquired Getty Petroleum marketing stock at the
18 beginning of 2001, so that's the beginning point. And the end
19 point is when MTBE, the use of it was discontinued in 2005. So
20 it's our view is that if there's going to be jurisdictional
21 discovery then it should be focused on that issue. Because at
22 the end of the day --

23 THE COURT: It may be that it begins when you say.
24 I'm not so sure it ends when you say because there are
25 consequences to the use that continued past the point of that

F1FFMTBC

1 use. So I don't know that 2005 is the cutoff. I can see --

2 MR. TUIITE: Excuse me. If you want to get into issues
3 of potential liability later on but in terms of whether either
4 Lukoil Americas used MTBE gasoline itself, which it didn't,
5 it's a holding company, it doesn't have operations, or it
6 should be held responsible for --

7 THE COURT: Is that's why I wasn't ready to agree to
8 the four-year period.

9 MR. TUIITE: I think it should be, the discovery ought
10 to be principally focused on the period of 2000 to 2005.

11 THE COURT: I've already told you I don't agree with
12 the cutoff date. I agree with the start date. Let me hear
13 from Mr. Miller. Do you agree with this?

14 MR. MILLER: Your Honor, there are some events that
15 precede 2001 that we need discovery on.

16 THE COURT: Actually your adversary said 2000 but go
17 ahead.

18 MR. MILLER: Yes. And we're not as confident as he is
19 on the 2005 cutoff date.

20 THE COURT: Neither am I. You're ahead on that
21 already. What would be your suggestion of a cutoff date, if
22 any?

23 MR. MILLER: Your Honor, we intend to ask discovery
24 for the relevant period.

25 THE COURT: Namely?

F1FFMTBC

1 MR. MILLER: I'm not -- we estimate at the moment that
2 2000 to 2006 will probably cover most of the transactions. But
3 until we see the documents I can't say that with confidence. I
4 can tell you that we are going to focus our discovery on what
5 we consider to be the relevant events and the time period
6 associated with that and we have no interest in going into a
7 larger issue.

8 THE COURT: Okay. Well, stop now. That's sort of
9 good. It may be an extra year on each end from where you
10 started but that's just like ordinary bargaining and
11 negotiation you started from '01 to '05 you end up with 2000 to
12 2006. Yes I appreciate, Mr. Miller, that was not a commitment
13 that was a goal. It depends on what discovery shows. It may
14 be he'll be back here saying the six years wasn't enough I need
15 this, I need that the door is pretty much open on that but he's
16 agreeing on focusing at least starting now with 2000 to 2006
17 and seeing where the discovery goes.

18 MR. MILLER: Yes, your Honor. My colleague reminded
19 me that in 2007 the related bankruptcy and fraudulent transfers
20 occurred so we may need to include that period as well as our
21 letter brief explained.

22 MR. TUIITE: Excuse me, your Honor, actually, your
23 Honor, the transaction they're talking about occurred the end
24 of 2009 which is well past the 2006 period. I think what
25 really makes sense here is to come up with what we think is the

F1FFMTBC

1 most likely period of relevance. Sounds like 2000 to 2006.

2 THE COURT: Correct.

3 MR. TUIITE: If we conduct discovery on that and
4 there's still some questions we can address them at that point
5 in time.

6 THE COURT: Correct.

7 MR. TUIITE: But let's focus on what is the biggest
8 bang for the buck here 2000 to 2006.

9 THE COURT: I agree, Mr. Tuite. Mr. Axline?

10 MR. AXLINE: I'm sorry, I don't usually do this. I
11 did prepare this part of the letter.

12 THE COURT: You mean you're going to contradict
13 Mr. Miller?

14 MR. MILLER: I'm going to supplement Mr. Miller. I
15 would never think of contradicting.

16 THE COURT: I didn't think so.

17 MR. AXLINE: One of the absolute essential facts that
18 we need to look at is what happened at the 2009 spinoff of the
19 Getty assets at the time they had significant liability for the
20 MTBE contamination and whether Lukoil as alleged in the
21 bankruptcy proceedings spun those off in order to rid itself
22 of, well, they spun off the good assets kept the bad assets put
23 them into bankruptcy. There was a 17-day trial on that. We
24 would like access to the --

25 THE COURT: I'm sorry there was a trial already?

F1FFMTBC

1 MR. AXLINE: There was a 17-day trial that ended in a
2 \$93 million settlement with Lukoil Americas Corporation, the
3 entity we named in our complaint agreed to pay the trustee
4 \$93 million to settle claims about that transaction and we are
5 very interested in that transaction. And getting access to the
6 trial transcripts and documents.

7 THE COURT: Isn't that public?

8 MR. AXLINE: No, they were sealed and they're
9 confidential.

10 THE COURT: The trial transcript was sealed?

11 MR. AXLINE: I think they were sealed. I know a lot
12 of the key documents were.

13 THE COURT: That may be so but the trial transcript?
14 Trials are usual public.

15 MR. TUIITE: Let me address that. Some portions of the
16 testimony were sealed but much of the trial is public.

17 THE COURT: I would think.

18 MR. TUIITE: And again, this transaction that was at
19 issue in this trial that occurred in 2013 had nothing to do
20 with environmental liabilities.

21 THE COURT: Since most of the transcript is public,
22 Mr. Axline, I suggest you get it and start reviewing that which
23 is public and then if there's more to talk about there as to
24 what the discovery should be I'm sure you'll be better prepared
25 after you read the thousands of pages that you can get at to

F1FFMTBC

1 make the argument. But the bottom line is there's again some
2 level of agreement. I am going to permit jurisdictional
3 discovery. The best way to start such discovery is for the
4 lawyers to meet and confer, to set up their own schedule. If
5 they can't agree then I'm happy to resolve disputes but they
6 should try to talk about it for a reasonable time for that
7 jurisdictional discovery and a reasonable scope for that
8 jurisdictional discovery. Do you have a thought Mr. Tuite or
9 Mr. Axline as to how long this might take to do or are you
10 thinking we could complete jurisdictional discovery in two to
11 three months? Does that sound like what you had in mind?

12 MR. AXLINE: I would think three months would be
13 adequate, assuming there's cooperation on both sides.

14 MR. TUIE: We would agree to cooperate.

15 THE COURT: So then you think three months sounds
16 reasonable?

17 MR. TUIE: Three months sounds reasonable.

18 THE COURT: So we have a start here. Meet and confer
19 quickly, see if you can set up a three-month schedule. Come
20 back in mid-April, or sooner if you have a dispute. If you
21 have no disputes come back in mid-April and tell me if you want
22 to have briefing on the jurisdictional issue. It may be that
23 those facts, Mr. Axline, either you will be convinced there is
24 no personal jurisdiction or you would be ready to litigate it
25 with more facts at your disposal but at least you'll have the

F1FFMTBC

1 evidence one way or the other. I'll be sure to agenda this one
2 before mid-April if I don't see you before that with disputes
3 on discovery. All right?

4 MR. AXLINE: Yes, your Honor.

5 THE COURT: On the Pennsylvania case is there anything
6 else we should be discussing today?

7 MR. LILLIE: Your Honor, Mark Lillie for BP. The one
8 thing we didn't speak on any detail is our alternate motion
9 under Rule 12. We have a motion to dismiss. Your Honor set an
10 order back in October requiring any motions to dismiss be filed
11 by the 21st of December. We did that. Your Honor has set a
12 briefing schedule now on that.

13 THE COURT: Right.

14 MR. LILLIE: And the response brief from the
15 plaintiffs is due on February 20, our reply is due on March 20
16 and that motion raises three specific legal issues under
17 Pennsylvania law which we think probably do need to be
18 addressed. I'd be happy to give you a preview of the motion
19 now if you'd like.

20 THE COURT: This is the one where you said the plea
21 brief is March 20?

22 MR. LILLIE: The response brief is February 20.

23 THE COURT: February 20 and the reply March 20? That
24 will be fully submitted March 20?

25 MR. LILLIE: Correct, your Honor.

F1FFMTBC

1 THE COURT: You know, I will surely have forgotten by
2 March 20 what you tell me on January 15, so either we'll have
3 oral argument on this on the back end or the briefs will be
4 sufficient and I could let you know which it is after the
5 briefs come in whether I think oral argument will be helpful.
6 It's not that I don't like previews but it's like you either
7 see the movie or you see the preview. I'll probably have to
8 see the movie on this one anyway.

9 MR. LILLIE: Very well.

10 THE COURT: I don't do premotion conferences on
11 motions to dismiss for that reason. I have some success on
12 summary judgment on persuading some arguments or not but on
13 motions to dismiss I've learned to let the parties do what they
14 have do to do.

15 MR. LILLIE: Very well. We'll be happy to leave this
16 as is.

17 THE COURT: Unless anybody thinks we should? No. So
18 I'll take a look at things, let's finish the briefing schedule
19 and if I think we need oral argument I'll call you in.

20 So that does take us to the Puerto Rico case, right?
21 I understand, sadly, in my opinion that by one vote lost, the
22 Supreme Court of Puerto Rico would not take the certification
23 here. It was five to three. What would have happened if it's
24 four to four. What happens in a tie. Anybody know the answer?
25 Nobody knows because I didn't know whether the loss was by one

F1FFMTBC

1 vote or two. If there had been a four-four vote wrongly I
2 assumed they would have taken it. But anyway there's a motion
3 for reconsideration. Who wants to, why should, what did the
4 Court miss? In other words, if you fully brief something what
5 does reconsideration mean really? Is it really reargument?
6 Are you going to tell them they really missed something?

7 MR. GILMOUR: John Gilmour on behalf of the
8 Commonwealth, your Honor. It's hard to say because in the
9 denial of certification the majority did not issue a
10 substantive opinion.

11 THE COURT: I wondered about that.

12 MR. GILMOUR: The minority did issue a substantive
13 opinion and said that the question as argued by the plaintiff
14 met all of the requirements both in code and the rules and
15 should have taken certification and also noted that the
16 defendants had missed their deadline for briefing despite the
17 fact that the Court had granted them an extension. So given
18 that indication by the minority the Commonwealth felt it was
19 necessary to file for rehearing and did so within the ten days
20 permitted on January 7.

21 THE COURT: So in other words it's possible that one
22 vote could get turned around. So when will the full briefing
23 on the reconsideration be complete?

24 MR. DILLON: Your Honor, Michael Dillon for defendants
25 in Puerto Rico. The defendants will be submitting opposition

F1FFMTBC

1 for that motion for recertification.

2 THE COURT: When is that, when is it due?

3 MR. DILLON: It's due I believe a week from tomorrow.
4 It's ten working days from notice of the initial motion. I
5 think defendants intend to file sooner than that.

6 THE COURT: Do you get a reply then, Mr. Gilmour?

7 MR. GILMOUR: No, your Honor. I do not think we do.

8 THE COURT: Just two briefs?

9 MR. GILMOUR: That's correct.

10 MR. DILLON: That's right. Then the motion is fully
11 submitted. I will note for the Court that local counsel
12 apprised me that if the Court were to deny that motion for
13 reconsideration plaintiffs are entitled to a second motion for
14 reconsideration to be filed as I understand it within three
15 working days from that denial.

16 THE COURT: What does that one say? You've been
17 wronged twice?

18 MR. DILLON: I'm not certain, your Honor.

19 THE COURT: That's a strange procedure. So you get to
20 say you're wrong once and if you lose you get to say it again
21 to the same group of judges, right?

22 MR. GILMOUR: This is the first that I've heard of our
23 second bite, your Honor.

24 THE COURT: Well, apparently you do, within three
25 days. Anyway, what this all adds up to is maybe in 30 days

F1FFMTBC

1 we'll know with finality.

2 MR. GILMOUR: Yes, your Honor.

3 THE COURT: Okay. Wouldn't it make sense to put off
4 the statute of limitations briefing for 30 days and let the
5 Supreme Court of Puerto Rico play itself out hearing
6 reconsideration motions. If that's their procedure, that's
7 their procedure. That's what the plaintiffs suggest anyway,
8 right?

9 MR. GILMOUR: Yes, your Honor. That's our position.

10 THE COURT: I'm with you on this one. Let's let it
11 play itself out. They did act fast. I remember the argument
12 when you said, Mr. Gilmour, that you believed they would act
13 fast. Some of defense counsel said, oh, no, it's going to take
14 a year. It didn't. They acted quickly so I assume they'll act
15 quickly on the reconsideration and the second reconsideration.
16 So why don't we just agenda it for a month from now.

17 Now, if they stick with their position then why are
18 some of these motions even necessary? Why should the
19 defendants have to make some of the motions? In other words,
20 shouldn't you meet and confer and say given the ruling, we
21 realize now what's barred and what's not barred?

22 MR. GILMOUR: Your Honor, I think we would certainly
23 be open to meeting and conferring with defendants and seeing
24 the identified defendants and the identified evidence and
25 making that determination once it plays out in the Puerto Rico

F1FFMTBC

1 Supreme Court.

2 THE COURT: I think that makes the most sense, too,
3 before you come back into court and say we want to make
4 different reconsideration motions and here's the schedule. If
5 the ruling stands, as Mr. Dillon recognizes, it might be wise
6 to have the meet and confer first to see where there's
7 disagreement and where there might be agreement so that the
8 motions to reconsider may be less than they would otherwise be.

9 MR. DILLON: I would point out that in our letters
10 that would also apply to the Puerto Rico 2 action. It would
11 give us the opportunity to discuss that, too.

12 THE COURT: I can't quarrel with that. You agree,
13 right?

14 MR. GILMOUR: Yes.

15 THE COURT: Does it become appealable, however, some
16 day, somewhere?

17 MR. GILMOUR: Yes.

18 THE COURT: Where would that appeal be taken?

19 MR. GILMOUR: It depends on the posture of the case,
20 your Honor. If the case was finally adjudicated in this court
21 it would be taken to the Second Circuit. If it is remanded for
22 trial to Puerto Rico and concludes there, it would be taken to
23 the First Circuit, your Honor.

24 THE COURT: Well, it's got to go back to Puerto Rico
25 some day because this issue doesn't close every claim in both

F1FFMTBC

1 cases, does it?

2 MR. GILMOUR: No, your Honor.

3 THE COURT: So it sounds like that decision some day
4 would go to the First Circuit, not the second.

5 MR. GILMOUR: Yes, your Honor. And the only instance
6 it would go to the Second Circuit is if the entire case with
7 all defendants was adjudicated in this court on multiple bases
8 but you're right this one issue would not resolve all of them.

9 THE COURT: And I'm sure the defense sees that too.

10 MR. DILLON: We do, your Honor.

11 THE COURT: Good. So there's nothing to do but to set
12 another conference date.

13 Sounds like six weeks instead of four. Usually we
14 meet in four but I'm thinking six so that the Puerto Rico case
15 is more advanced, maybe we'll have more to talk about in New
16 Jersey and maybe even in Pennsylvania the discovery will get
17 started and we'll see whether there are disputes or whether
18 everybody is getting along without the need for the Court, so I
19 think we should look in about six weeks. That would be early
20 March, right?

21 MR. DILLON: Yes, your Honor.

22 THE COURT: Thursday, March 5 at 4:30, is that okay?
23 Thursday, March 5th?

24 MR. PARDO: That's good for us. Your Honor.

25 MR. GILMOUR: I believe that's good for us, your

F1FFMTBC

Honor.

THE COURT: That's what it is, Thursday, March 5th at 4:30. Again, I have a trial scheduled for that week but my trials seem to fold with regularity. If it does we can move it up to 2:30. But right now it's 4:30. All right, if there's nothing further see you all in March.

(Adjourned)